SUPREME COURT, U. S.
FILED
MAR 7 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 862

PERCY C. MAGNUS, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

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March 7, 1967.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING

Petitioner respectfully prays that this Court grant rehearing of its Order of February 13, 1967, denying the Petition for Certiorari, that said Order be vacated and that a writ of certiorari thereupon issue to review the judgment and opinion of the Second Circuit in this case.

This Petition for Rehearing, filed pursuant to Rule 58(2) of this Court, is premised in the words of that

Rule upon "other substantial grounds available to petitioner although not previously presented." See *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U.S. 47, 50; *Massey* v. *United States*, 291 U.S. 608; *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962; *Cahill* v. *New York, N.H. & H.R. Co.*, 351 U.S. 183, and cases cited therein. In so premising this Petition, however, petitioner does not waive or abandon any of the questions presented or grounds advanced in the Petition for Certiorari. Petitioner believes that the grounds advanced previously fully deserve reconsideration by this Court, particularly in view of the fact that the Government has not denied the misquotation to the jury of the *Spies* standard of wilfulness and has not denied that this very prosecution was in violation of the prosecutorial policy of the Government as announced to this Court in *Sansone* v. *United States*, 380 U.S. 343.

In a footnote at page 3 of the Petition for Certiorari, petitioner reserved the right, in the event certiorari were granted, to brief and argue the following additional question:

> 4. Whether, in the trial of a taxpayer accused of wilful failure to pay federal income taxes in three specified years, the admission of a mass of contradictory evidence concerning the taxpayer's record as to filing returns and paying taxes in earlier and unrelated years, relative to both federal and state income tax obligations, was unduly prejudicial.

It is that question and the compelling reasons for review thereof that form the main basis of this Petition for Rehearing.

A. The Relevant Facts

The petitioner was here found guilty, after a jury trial, of the misdemeanor of wilfully failing to pay his federal income taxes for the years 1955, 1956, and 1957—in violation of 26 U.S.C. § 7203. Simultaneously, he was acquitted of the felony charges of attempting to evade and defeat a large part of his income tax for each of those three years, in violation of 26 U.S.C. § 7201; and he was also acquitted of the additional misdemeanor charges of wilfully failing to file tax returns for each of the three years, in violation of 26 U.S.C. § 7203.

During the course of the jury trial, the District Court ruled, over objection, that it would allow the prosecution to introduce evidence as to the returns and payments of petitioner's federal income taxes for the years 1948 through 1954. App. 273a-274a. The court later ruled that the returns and payments of New York state income taxes for the three years in question (1955-1957) and for prior years were also admissible. App. 629a-630a. One of the prosecutors, an Assistant United States Attorney, stated frankly to the court on at least two occasions that this type of evidence was "very prejudicial." App. 571a, 595a.* As a result, the following testimony was introduced:

(1) Testimony as to petitioner's history of payment of his federal income taxes for the years 1948 through

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* Thus, with respect to the evidence of petitioner's returns and payments of New York state income taxes, the prosecutor stated (App. 595a):

> "May I say, your Honor, this evidence will be prejudicial. There is no doubt about it. Anything that is probative towards guilt is prejudicial. We are not introducing this *merely* to show propensities." [Emphasis added.]

1957. App. 294a, 319a-337a. But it later developed that some of the allegedly late payments for these years had in fact been made on separate returns filed by petitioner's wife in years when there had been no joint filing. App. 1560a-1561a. It further appeared that the Internal Revenue records for those years were so incomplete as to render any evidence as to those years speculative and unreliable. See, e.g., App. 1603a-1660a.

(2) Testimony that no timely federal returns had been filed for the years 1948 through 1954, App. 283a-287a, and testimony concerning petitioner's estimated taxes for the years 1948 and 1950, App. 824a-831a.

(3) Testimony as to petitioner's estimated federal taxes and actual taxes for the years 1950 and 1951. App. 357a, 366a-368a.

(4) Testimony as to the Internal Revenue Service's use, or lack thereof, of Forms W-2 for the periods of 1948 through 1952. App. 415a-416a, 438a-439a.

(5) Testimony by the chief Government witness, Cummings, about numerous federal tax transactions preceding 1955, including transactions prior to 1948. App. 468a-474a, 524a-543a, 625a-626a, 644a, 681a, 707a, 713a-718a, 785a, 788a, 794a-796a, 804a-810a, 822a, etc.

(6) Testimony concerning petitioner's filing of New York state returns from 1946 to 1949. App. 590a, 629a-630a. Confused and contradictory testimony was also given about petitioner's 1951 New York state tax return. App. 1029a-1034a. Testimony about the supposed failure to file a 1954 tax return was withdrawn, in the presence of the jury, after the witness testified that a further search had revealed that such return had in fact been filed. App. 1039a-1042a. Similarly,

after testifying about the failure to file a 1953 return, the prosecution witness conceded that a timely filed return had just been found in a folder. App. 1045a-1049a.

(7) To overcome the "mystery" of how the New York tax returns for 1946-1949 were all timely executed by petitioner but were not reflected in the official files as received until 1951, the prosecution represented to the court that it had a witness, Lionel Silverman, who would testify that his office typed a letter in September 1951 to the New York State Tax Commission stating that petitioner's returns for 1946-1951 had been filed "2 months ago" and the taxes paid. App. 1079a-1080a. Over objection, the letter was admitted into evidence. Silverman swore he did not sign the letter, had no recollection of ever writing it, had no recollection of directing anyone to sign his name, and did not know the petitioner. App. 1091a-1096a.

(8) Also admitted into evidence was Government Exhibit 106 (App. 2087a), a handwritten summary of checks for petitioner's taxes payable to the Collector of Internal Revenue for the years 1944-1950, which had been prepared by the Government witness as an *aide memoire* for his testimony at the trial. App. 1517a-1537a. Objection to this exhibit was made on grounds that it was prejudicial since it referred to payments for assessments and other federal tax matters for years prior to 1948, which the court had previously excluded. App. 1522a-1523a.

B. The Rulings Below

The purported purpose of offering the foregoing testimony concerning petitioner's tax history for the earlier years from 1944 through 1954 was that it evi-

denced "similar acts" on petitioner's part and thus bore on his intent during the indictment years of 1955, 1956 and 1957. Petitioner's objection rested on claims that the proof was unduly confused, misleading and prejudicial and that the evidence as to these prior years was too unrelated in time and subject matter to the acts charged in the indictment to qualify for admissibility. With respect to the evidence as to the state tax returns, petitioner objected that such evidence showed a pattern totally dissimilar from anything that allegedly took place regarding his federal tax returns for the three indictment years in question.

The District Court overruled all objections to this testimony, including a motion to strike all the testimony concerning the New York tax history, on the theory that it was relevant to the issue of wilfulness. And of the 20 pages of the record covering the court's charge on the misdemeanor counts, 9 pages or approximately one-half were devoted to instructions as to the use to be made of the testimony as to the prior years. App. 1971a-1984a, 1986a-1992a. The Court of Appeals affirmed this action, Pet. App. 6a-7a, stating:

> "Magnus' prior taxpaying history, both federal and state, was probative of his wilfulness in failing to pay substantial amounts of federal taxes in 1955, 1956, and 1957 . . . . In particular, Magnus' experience with the New York State income tax not only might be considered to 'bear upon his attitude toward the reporting and payment of taxes generally.' *United States* v. *Taylor,* 305 F. 2d 183, 185-86 (4 Cir.), cert. denied, 371 U.S. 894 (1962), but it also tended to show both that his failures to file returns and to pay taxes commenced before the hiring in 1949 of Cummings, on whom the defense sought to throw the onus of his failures, and that Magnus had been appraised that his

arrangements for reporting and paying his income taxes failed to assure timely payment. We hold that this evidence was properly admitted to show wilfulness."

C. Reasons for Review

(1) In the exercise of its power of administration of criminal justice in the federal courts, this Court should review the judgment below to determine if the introduction of such a massive, contradictory and confusing eleven-year history of prior tax filings and payments unduly prejudiced the trial of this petitioner. There appears to be no recorded instance where even an attempt was made to introduce so extensive a record of alleged past defaults; nor is there any instance where the record was as confusing and self-contradictory as this one. Such confusion sprang from the incompleteness and inaccuracy of the official federal and state tax records for the eleven prior years.

With such a great bulk of misleading and unclear evidence admitted into the record, the petitioner was forced to come forward with substantial evidence in an effort to minimize the prejudice flowing from the Government's evidence. The resulting trial time, expense and effort devoted to these prior tax years could not but divert the jury's attention from the essential question before it as to petitioner's claimed failure to pay timely taxes for 1955-1957. Such a dangerous diversion from the essential question could not be overcome by the court's instructions that the evidence was relevant only on the issue of petitioner's wilfulness. However probative such evidence might otherwise be as to the matter of intent, the complete failure of the trial court to confine it to clear instances of past defaults of a similar nature made disallowance essential

"to prevent confusion of issues, unfair surprise and undue prejudice." Cf. *Michelson* v. *United States,* 335 U.S. 469, 476. See also *Hartman* v. *United States,* 280 F. 2d 386, 392 (C.A. 8), holding that the introduction of lengthy evidence concerning unrelated and technical past tax history could only "distract the attention of the jury from the issue they had to try and was necessarily prejudicial to defendant."

(2) The Second Circuit approved the admission of this confusing testimony as to petitioner's prior tax-paying history on the theory that such testimony was "probative of his wilfulness in failing to pay substantial amounts of federal taxes in 1955, 1956, and 1957." But neither the Second Circuit nor the District Court made any effort to confine or adjudge such testimony in terms of the similarity of the past actions to those involved in the indictment years. That failure not only creates a conflict with other Circuit decisions but gives rise to an important problem in the administration of the federal criminal tax statutes deserving of attention by this Court.

The proposition stated below that prior acts are admissible as probative of wilfulness respecting the current acts in question carries with it the essential corollary that, in Wigmore's words (2 Wigmore on Evidence, 3rd ed., 1940, § 302),

> ". . . it is at least necessary that prior acts should be *similar.* Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance. . . . In short, there must be a similarity in the various instances in order to give them probative value,—as indeed the general logical canon requires (ante, § 33)."

Various Circuits have insisted on this requirement of similarity as the critical price of admissibility of testimony respecting past acts. *Hartman* v. *United States,* 215 F. 2d 386, 392 (C.A. 8); *Greenberg* v. *United States,* 280 F. 2d 472, 474 (C.A. 1); *United States* v. *Long,* 257 F. 2d 340, 342 (C.A. 3); *Flemister* v. *United States,* 260 F. 2d 513, 519 (C.A. 5); *Lloyd* v. *United States,* 226 F. 2d 9, 17-18 (C.A. 5). Even the Second Circuit, acting through a panel differing from that involved in this case, has conceded the necessity of measuring the probative value of such testimony "by the extent to which the evidence of prior criminal activities, other than a conviction, *closely related in time and subject matter,* tends to establish that the accused committed the criminal act charged in the indictment knowingly or with criminal intent or tends to negative the claim that the acts were committed innocently or through mistake or misunderstanding." *United States* v. *Byrd,* 352 F. 2d 570, 574 (C.A. 2); emphasis added.

The record here is replete with instances of past tax filings remote in time and dissimilar in character. Many of them involved actual timely filings, discovered to be such only after Government witnesses had mistakenly testified as to their untimeliness. The necessity for insisting upon confining such evidence to true defaults "closely related in time and subject matter" to those in issue was thus particularly acute here in the context of a confusing and contradictory eleven-year tax history. And the failure so to confine the evidence creates a problem of major significance in the execution of the federal criminal statutes. It is a problem of a recurring nature, affecting the outcome of many tax default prosecutions under those statutes. Since

this Court has not had occasion heretofore to rule upon the necessity of so confining the evidence of past tax history to those instances similar in character and closely related in time, it becomes appropriate to grant review in this instance to explore the dimensions of this important problem.

CONCLUSION

For these reasons, in addition to those set forth in the Petition for Certiorari, the Order denying certiorari should be vacated and a writ issued so that the judgment and opinion below might be reviewed.

Respectfully submitted,

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March 7, 1967.

CERTIFICATE OF COUNSEL

We hereby certify that this Petition for Rehearing is filed in good faith and not for delay and that the Petition is restricted to the grounds set forth in Rule 58 of this Court.

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